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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
7/3/2019
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS, Appellant

v.

CESAR RAMIRO ARELLANO, Appellee

Appeal from Victoria County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellee, Cesar Ramiro Arellano.

*The case was tried before the Honorable Daniel F. Gilliam, Presiding Judge, County Court at Law 2, Victoria County, Texas.

*Counsel for Appellee at trial and on appeal was Constance Filley Johnson, Filley Law Firm, 214 S. Main, Victoria, Texas 77901. She is now the District Attorney of Victoria County; her office is recused. Appellee was unrepresented at the time the petition was filed but this Court ordered a hearing for the purpose of determining representation.

*Counsel for the State at trial was Alton James, III, Victoria County Assistant Criminal District Attorney, 205 North Bridge Street, Suite 301, Victoria, Texas 77901.

*Counsel for the State in the court of appeals was Brendan Wyatt Guy, Victoria County Assistant Criminal District Attorney, 205 North Bridge Street, Suite 301, Victoria, Texas 77901. He is no longer with that office.

*Timothy R. Poynter, Assistant District Attorney for DeWitt, Goliad, and Refugio Counties, 307 N. Gonzales, Cuero, TX 77954, was appointed to represent the State in this matter.

*Counsel for the State before this Court is John R. Messinger, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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No. PD-0287-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

The State of Texas, Appellant

v.

Cesar Ramiro Arellano, Appellee

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The movant in a motion to suppress should have the burden to prove that the good-faith exception to Article 38.23(a) does not apply. Proving that a warrant is missing a typed or printed signature block below the magistrate's signature does not satisfy that burden.

STATEMENT OF THE CASE

Appellee was charged with driving while intoxicated. The trial court suppressed the blood evidence, holding that no officer may rely in good faith on a warrant that does not have a typed or printed signature block as required by Texas Code of Criminal Procedure Article 18.04(5) because it is facially invalid.

STATEMENT REGARDING ORAL ARGUMENT

The Court denied the State's request for oral argument.

ISSUES PRESENTED

1. **Does Texas Code of Criminal Procedure Article 38.23(b), the "good faith" exception, apply to warrants that do not have the magistrate's name printed or typed under his signature?**

2. **In a motion to suppress evidence obtained with a warrant, does the defendant bear the burden of negating the "good faith" exception?**

3. **Does Texas Code of Criminal Procedure Article 28.01, § 1(6), governing hearings on motions to suppress, allow a trial court to ignore a mode of evidence it made necessary?**

4. **The court of appeals should abate and remand to the trial court for findings and conclusions requested by the State.**

STATEMENT OF FACTS

Officer Phillip Garcia arrested appellee for driving while intoxicated and obtained a search warrant for his blood.[1] Appellee's motion to suppress alleged one issue: "the warrant herein is facially invalid because it fails to meet the statutory requirements of Article 18.04 of the Texas Code of Criminal Procedure."[2] At the hearing, appellee agreed that the burden was on him because "a search warrant ha[d] been issued."[3] Appellee offered Defense Exhibit 1, an 11-page document that

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[1] Def. Ex. 1 (warrant application, warrant).

[2] 1 CR 37.

[3] 1 RR 6.

includes the warrant application, Garcia's affidavit, and the search warrant.[4] Appellee rested after it was admitted.[5] The State immediately rested, and the trial court invited argument.[6]

Appellee explained that the search warrant was "facially invalid" because the magistrate's signature did not "appear in clearly legible handwriting or in typewritten form with the magistrate's signature" as required by Texas Code of Criminal Procedure Article 18.04(5).[7] The State argued that Article 38.23(b), the exclusionary exception for good-faith reliance on a warrant, excuses the signature-block problem in this case.[8] Appellee objected to that argument without Officer Garcia's testimony and added that good-faith reliance requires a facially valid warrant.[9] The State countered that probable cause, the magistrate's neutrality, and Garcia's good faith could all be ascertained from Defense Exhibit 1 and any technical problems with the

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[4] Defense 1 is appended to the Reporter's Record.

[5] 1 RR 7-8.

[6] 1 RR 8.

[7] 1 RR 10-13, 20. All references to "articles" are to the Code of Criminal Procedure unless otherwise stated.

[8] 1 RR 13-16. *See* TEX. CODE CRIM. PROC. art. 38.23(b) ("It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.").

[9] 1 RR 16-17.

signature would not invalidate that.[10] "[T]here has been no evidence to the contrary . . . and no evidence that the magistrate was not neutral[.]"[11] Appellee clarified that probable cause was "not the issue here" and reiterated that "[t]he specific prerequisites for a sufficient warrant are not met by the warrant on its face."[12]

After a short break, the trial court requested "a formal brief on the . . . issue at hand" and invited the parties to include "any relevant case law, anything else that you want to submit with regard to cases or argument with regard to that."[13] The trial court them moved onto other pretrial matters.[14]

Appellee's trial brief reurged the argument that, regardless of whether Officer Garcia testified, good-faith reliance was impossible because the missing signature block made the warrant "facially invalid."[15] The State's brief focused on the sufficiency of the warrant application under Article 18.01—the statute defining search warrants—and the propriety of the magistrate's decision.[16] The State also argued that the magistrate's signature satisfied Article 18.04 but argued alternatively

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[10] 1 RR 17-21.

[11] 1 RR 21.

[12] 1 RR 21.

[13] 1 RR 25-26.

[14] 1 RR 26.

[15] 1 CR 43-45.

[16] 1 CR 67-68.

that Officer Garcia acted in good faith in accordance with Article 38.23(b).[17] This included the observation that the exception "exists precisely so search warrants won't be invalidated because of niggling technical defects," thereby discouraging officers from obtaining them.[18] The State argued that all the elements required under Article 38.23(b) could be satisfied by an affidavit from Officer Garcia and his offense report, which were attached to the trial brief.[19] In the absence of defense evidence to the contrary, the State argued, the magistrate's neutrality should be presumed.[20]

The trial court granted appellee's motion to suppress.[21] The State requested "essential findings" on five specific questions embracing the elements of Article 38.23(b).[22] The trial court adopted appellee's proposed findings and conclusions with one addition—that the State offered no evidence at the hearing on the issue of the magistrate's identity.[23] The trial court gave alternative legal bases for its ruling. First, Article 38.23(b) did not apply because the warrant was facially invalid.[24]

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17 1 CR 68.

18 1 CR 69.

19 1 CR 69-70, 79 (affidavit), 84 (offense report).

20 1 CR 70.

21 1 CR 42, 111.

22 1 CR 96-97.

23 1 CR 113 (Findings h, i).

24 1 CR 113-14 (Conclusions e, l).

Second, there was no evidence that Officer Garcia relied on the warrant in good faith because, even had the trial court opted to consider Garcia's post-hearing affidavit, it "[merely] provide[d] a recitation of the statutory requirements for the 'good faith exception' with respect to a warrant."[25] The trial court did not make "essential findings" requested by the State as to whether the magistrate was neutral or there was probable cause.[26]

SUMMARY OF THE ARGUMENT

The defendant, as movant, bears the burden of showing the inadmissibility of the evidence at a hearing on motion to suppress. When a defendant alleges a violation of statute through Article 38.23(a), he has the burden of proving both the violation of the statute and the "causal connection" between that violation and the evidence at issue. He should also have to prove the good-faith exception to the Texas exclusionary rule—Article 38.23(b)—does not apply.

In this case, appellee's bare claim that the omission of a typed or handwritten signature block below the magistrate's signature on the blood-draw warrant made it facially invalid was insufficient to carry his burden. The lower courts in this case were wrong to hold that Article 38.23(b) does not apply to the warrant at issue and wrong to implicitly place a burden on the State to justify the exception. Alternatively,

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[25] 1 CR 114-15 (Conclusions g-k).

[26] *See* 1 CR 96-97 (requested findings 2, 4).

to the extent the State has the burden to prove Article 38.23(b)'s applicability, it was prevented from doing so by the trial court.

ARGUMENT

I. The statute at issue.

This case requires review of Article 38.23, the Texas exclusionary rule. Its central provision, subsection (a), reads in pertinent part:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.[27]

Subsection (b) is the sole exception[28] to this rule:

> It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.[29]

Although Article 38.23 was part of the 1965 code revision,[30] subsection (b) was not added until 1987.[31] It began life as bill to synchronize exclusion under Article 38.23

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[27] TEX. CODE CRIM. PROC. art. 38.23(a). The statute also provides for a jury instruction.

[28] *See Garcia v. State*, 829 S.W.2d 796, 799 n.2 (Tex. Crim. App. 1992) (plurality) (calling article 38.23(b) "its sole exception"); *State v. Daugherty*, 931 S.W.2d 268, 270 (Tex. Crim. App. 1996) ("[W]here a statute contains an express exception, its terms must apply in all cases not excepted.").

[29] TEX. CODE CRIM. PROC. art. 38.23(b).

[30] Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966.

[31] Acts 1987, 70th Leg., ch. 546, § 1, eff. Sept. 1, 1987.

with the Supreme Court's rulings on constitutional inadmissability.[32] It was the Senate Committee Substitute bill that gave it the form we see today.[33] The Senate Bill Analysis justified the addition thus:

> Cases have arisen in which evidence has been ruled inadmissible against a defendant due to technical defects in the search warrant or similar technical errors in the manner in which the evidence was obtained. Often, the officer or other official acted in "good faith" while obtaining the evidence. The U.S. Supreme Court has ruled that evidence obtained in "good faith" is admissible as an exception to the "exclusionary rule." Presently, Article 38.23 does not parallel this exception.[34]

The House Bill Analysis of that substitute said the purpose of the bill was to "allow evidence obtained by honest mistake in reliance on a warrant to be used in a criminal trial."[35]

A. A "good faith" exception recognizes reality.

To some degree, then, subsection (b) was based on the then-recent decision in *United States v. Leon*.[36] *Leon* came to the Supreme Court on the unchallenged finding that the warrant in that case was not based on probable cause but also with the

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[32] https://lrl.texas.gov/LASDOCS/70R/SB1/SB1_70R.pdf#page=1.

[33] https://lrl.texas.gov/LASDOCS/70R/SB1/SB1_70R.pdf#page=3.

[34] https://lrl.texas.gov/LASDOCS/70R/SB1/SB1_70R.pdf#page=5.

[35] https://lrl.texas.gov/LASDOCS/70R/SB1/SB1_70R.pdf#page=18.

[36] 468 U.S. 897 (1984).

trial court's opinion that he acted in good faith.[37] The question presented was, "Whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective."[38] The Court concluded that "[i]ndiscriminate application of the exclusionary rule . . . may well generate disrespect for the law and administration of justice" "when law enforcement officers have acted in objective good faith or their transgressions have been minor."[39]

In that vein, neither the absence (upon review) of probable cause nor "a technically defective warrant" justifies exclusion except "in those unusual cases in which exclusion will further the purposes of the exclusionary rule."[40] "In short, where the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way" and "can in no way affect his future conduct unless it is to make him less willing to do his duty."[41] "This is particularly true . . . when an officer acting with objective good faith has obtained

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37 *Id*. at 904-05.

38 *Id*. at 905.

39 *Id*. at 908 (citations, quotations, and alterations omitted).

40 *Id*. at 918.

41 *Id*. at 919-20 (internal quotation and citation omitted).

a search warrant from a judge or magistrate and acted within its scope."[42]

This Court has recently reaffirmed a similar view of Article 38.23(b). In *McClintock v. State*, it held that "the language of the statutory exception is broad enough to . . . accommodate" the rule that "[a]n officer who reasonably believes that the information he submitted in a probable cause affidavit was legally obtained has no reason to believe the resulting warrant was tainted" by the absence, in hindsight or upon further development of the law, of probable cause.[43]

B. Both the federal and state exceptions have their limits.

The Supreme Court put limits on its exception, however, presumably based on the recognition that the warrant process could be abused. Suppression remains appropriate when:

1) the affiant has misled the magistrate in violation of *Franks v. Delaware*, 438 U.S. 154 (1978);
2) the magistrate "wholly abandon[s] his judicial role" by acting as an adjunct to law enforcement or issuing general warrants;
3) the supporting affidavit is so lacking in indicia of probable cause as to render any reliance on the warrant unreasonable;
4) the warrant is "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid."[44]

The fourth is relevant in this case. The Supreme Court explained that what would

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[42] *Id*. at 920.

[43] 541 S.W.3d 63, 72-73 (Tex. Crim. App. 2017), *reh'g denied*, 538 S.W.3d 542 (Tex. Crim. App. 2017).

[44] *Leon*, 468 U.S. at 923.

make a search warrant "facially deficient" is the "fail[ure] to particularize the place to be searched or the things to be seized."[45] In its conclusion, the Court said, "In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."[46] It held that the officer in Leon's case reasonably relied on the magistrate's determination of probable cause notwithstanding the fact that it was found insufficient at the suppression hearing.[47]

Article 38.23(b) is more limited. Despite starting out as a bill intended to link Texas suppression to Supreme Court practice, the resulting legislation breaks sharply with it in one sense: subsection (b) requires that the warrant be based on probable cause. What is not clear is how subsection (b) breaks with standard procedure when making a Fourth Amendment claim. Specifically, who has the burden to plead or prove the exception?

II. The defendant should have the burden to show Article 38.23's exception does not apply.

This Court has consistently held the defendant, as the moving party on a motion to suppress, to the burden of proof and persuasion. Comparing the

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[45] *Id*.

[46] *Id*. at 926.

[47] *Id*.

frameworks for Fourth Amendment and statutory (Article 38.23) claims shows that the defendant invoking Article 38.23 should also bear the burden of disproving its exception.

A. Movants have the initial burden.

Almost 50 years ago, in *Mattei v. State*, this Court adopted the following regarding the burden of proof at a hearing on motion to suppress:

> The burden of persuasion is properly and permanently placed upon the shoulders of the moving party. When a criminal defendant claims the right to protection under an exclusionary rule of evidence, it is his task to prove his case. In the areas of coerced confessions and illegal searches and seizures this rule is reinforced by the usual presumption of proper police conduct.
>
> The moving party must also bear the burden of producing evidence. If the essential evidence is not brought to light the motion must fail. It is true, however, that in asserting an illegal arrest the defendant must satisfy this burden by showing that the arrest was made without a warrant. While an arrest pursuant to a warrant is prima facie evidence of probable cause, the prosecutor should be forced to come forward with evidence of probable cause in the absence of a warrant. Without such a rule there would be little reason for law enforcement agencies to bother with the formality of a warrant. Furthermore, the evidence comprising probable cause is particularly within the knowledge and control of the arresting agencies.[48]

This model gives rise to two similar yet distinct frameworks.

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[48] *Mattei v. State*, 455 S.W.2d 761, 766 (Tex. Crim. App. 1970) (quoting *Rogers v. United States*, 330 F.2d 535, 542-43 (5th Cir. 1964), *cert. denied*, 379 U.S. 916 (1964)) (internal citations omitted).

Fourth Amendment claims

The first is for claimed violations of the Fourth Amendment. In *Russell v. State*, this Court cited *Mattei* when it said:

> When a defendant seeks to suppress evidence on the basis of a Fourth Amendment violation, this Court has placed the burden of proof initially upon the defendant. As the movant in a motion to suppress evidence, a defendant must produce evidence that defeats the presumption of proper police conduct and therefore shifts the burden of proof to the State. A defendant meets his initial burden of proof by establishing that a search or seizure occurred without a warrant.
>
> Once a defendant has established 1) that a search or seizure occurred and 2) that no warrant was obtained, the burden of proof shifts to the State. If the State produces evidence of a warrant, the burden of proof is shifted back to the defendant to show the invalidity of the warrant. If the State is unable to produce evidence of a warrant, then it must prove the reasonableness of the search or seizure.[49]

This Court held that the trial court should not have considered whether Russell's confession and other evidence were tainted by an illegal arrest because, although there was plainly no warrant, Russell had not shown that he was "seized."[50] In January of this year, this Court reaffirmed the language of *Russell* in *State v. Martinez*, quoting the above block quote in full.[51] In that case, the burden shifted to

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[49] *Russell v. State*, 717 S.W.2d 7, 9-10 (Tex. Crim. App. 1986) (on reh'g), disapproved of on other grounds by *Handy v. State*, 189 S.W.3d 296, 299 n.2 (Tex. Crim. App. 2006) (citations omitted).

[50] *Id*. at 11.

[51] *State v. Martinez*, 569 S.W.3d 621, 624 (Tex. Crim. App. 2019) (quoting *Russell*, 717 S.W.2d at 9-10).

the State to prove an exception to the warrant requirement because it was undisputed that Martinez was arrested without a warrant.[52]

Article 38.23(a) claims

The second framework is for Article 38.23(a). "This procedure is substantially similar to that required when there is a motion to suppress under the Fourth Amendment" but "is a separate inquiry based on separate grounds."[53] "[A] defendant who moves for suppression under Article 38.23 due to the violation of a statute has the burden of producing evidence of a statutory violation[; o]nly when this burden is met does the State bear a burden to prove compliance."[54] Presiding Judge Keller has suggested that the nature of the alleged statutory violation dictates the placement of specific burdens, if any, treating the defendant/movant as the "prosecutor."[55]

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[52] *Id*.

[53] *State v. Robinson*, 334 S.W.3d 776, 778-79 (Tex. Crim. App. 2011).

[54] *Id*. at 779; *see also Pham v. State*, 175 S.W.3d 767, 773 (Tex. Crim. App. 2005) ("'When a criminal defendant claims the right to protection under an exclusionary rule of evidence, it is his task to prove his case.'") (quoting *Mattei*, 455 S.W.2d at 766).

[55] *White v. State*, 549 S.W.3d 146, 161-62 (Tex. Crim. App. 2018) (Keller, P.J., concurring). If, for example, the alleged violation is of an offense with an affirmative defense, the State should have to prove it. *Id*. at 162; *see* TEX. PENAL CODE § 2.04(b) ("The prosecuting attorney is not required to negate the existence of an affirmative defense in the accusation charging commission of the offense."), (d) ("If the issue of the existence of an affirmative defense is submitted to the jury, the court shall charge that the defendant must prove the affirmative defense by a preponderance of evidence."). This will be discussed more below.

But it is not enough for a defendant to establish the violation of a statute actionable under Article 38.23(a).[56] "Under Texas case law, it is required that a causal connection be established, and we hold that the defendant, as the moving party wishing to exclude the evidence, is responsible for the burden of proving this connection."[57] In *State v. Robinson*, for example, the defendant failed to shoulder his burden because he failed to present evidence that the State violated the relevant statute by having an unqualified person draw his blood.[58]

The two frameworks are distinct but can be reconciled.

Examining the two frameworks together shows they are largely consistent. First, the defendant, as movant, must show that the State violated his rights. The defendant does this by establishing a warrantless search or seizure or the violation of

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[56] *Pham*, 175 S.W.3d at 774. *See Wilson v. State*, 311 S.W.3d 452, 459 (Tex. Crim. App. 2010) (orig. op.) ("Although the plain language of article 38.23(a) would suggest that evidence obtained in violation of *any* law must be suppressed, the State is correct in its assertion that article 38.23(a) may not be invoked for statutory violations unrelated to the purpose of the exclusionary rule.") (emphasis in original).

[57] *Pham*, 175 S.W.3d at 774. This Court went on to say that, once a violation is established, "[t]he burden then shifts to the State to either disprove the evidence the defendant has produced, or bring an attenuation-of-taint argument to demonstrate that the causal chain asserted by the defendant was in fact broken." *Id*. Judge Keasler dissented to this shifting of burdens because, *inter alia*, as this Court had previously held in *State v. Daugherty*, "the 'ordinary meaning' of 'obtained' accommodated the attenuation doctrine because 'depending on how removed the actual attainment of the evidence is from the illegality, the ordinary person would not consider that evidence to have been obtained by that illegality.'" *Id*. at 775 (Keasler, J., dissenting) (quoting *Daugherty*, 931 S.W.2d at 270). Judge Keasler is correct, but it is unnecessary to resolve that issue in this case.

[58] *Robinson*, 334 S.W.3d at 779. *See* TEX. TRANSP. CODE § 724.017(a) (listing who may take a blood specimen at the request or order of a peace officer).

a statute. Second, the defendant must also prove that the violation led to the evidence at issue. This threshold burden is automatically satisfied with a warrantless search due to the presumption of unreasonableness but can be harder with statutory violations. Only at this point will the State be forced to show that its actions were reasonable without a warrant or not actually in violation of the statute at issue.[59] And in both cases, "the burden of persuasion is properly and permanently placed upon the shoulders of the moving party."[60]

B. But what about Article 38.23(b)?

Although this Court has been clear on the shifting burdens in the usual case under Article 38.23(a), it has not established who has the burden to prove (or disprove) the applicability of Article 38.23(b). By its plain language and the interpretation of this Court, subsection (b) is an exception to the statutory exclusionary rule. That should matter. If the defendant, as movant, has the burden to show a violation of a statute and the "causal connection," he should have to show that the exclusionary rule upon which he relies actually applies. That means proving the exception does not. This makes sense for multiple reasons.

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[59] Again, this Court currently places a burden on the State to prove the evidence was not actually "obtained" in violation of the law after the defendant proves that the "causal connection" between the violation and that evidence.

[60] *Pham*, 175 S.W.3d at 773 (quoting *Mattei*, 455 S.W.2d at 766).

Requiring the defendant to negate the exception brings the two frameworks together.

It would be easy to assume that a "good faith" statutory exception meant to parallel the "good faith" exception to the federal exclusionary rule would similarly place a burden on the State, but the two operate very differently.

As explained in *United States v. Leon*, the federal rule serves to excuse the absence of probable cause when an officer has obtained a warrant in good faith.[61] At the point at which it comes into play, the defendant has discharged his burden of rebutting the presumption of proper police conduct by showing there was, in fact, no probable cause for the warrant. That is when the burden shifts to the State to show why the search or seizure was reasonable notwithstanding the lack of probable cause.

Unlike in the Fourth Amendment context, where the State must prove an exception to the Fourth Amendment requirement of a warrant based on probable cause, Article 38.23(b) *is* the requirement of a warrant based on probable cause. Texas requires the very thing the Supreme Court excused in *Leon*. The existence of a warrant places a defendant in the position he would be in had he made a bare Fourth Amendment claim: rebutting the presumption of proper police conduct. Appellee would have had the burden under the Fourth Amendment to invalidate a warrant. He should have the burden to invalidate a statutory exception based on a warrant.

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[61] *Leon*, 468 U.S. at 904-05.

It is consistent with the treatment of exceptions generally.

Exceptions are a familiar concept in criminal law.[62] They place a burden on the party asking for something before the proceeding starts. If, as Presiding Judge Keller suggested in her concurrence to *White v. State*, a defendant should be treated the same in a pretrial suppression hearing as the State is at trial with regard to burdens,[63] he should have the obligation to negate any exception to the penal offense comprising the statutory violation. The movant should be the protagonist in all respects.

The only difference between Presiding Judge Keller's example and this case is that the burden at issue is more global. Instead of looking at the details of a penal code violation urged through Article 38.23, we are looking at Article 38.23 itself. Like the State at trial, a defendant has the burden of pleading and proof of the "elements" of Article 38.23(a)—violation and causation. But the Legislature has determined that no violation a defendant proves under Article 38.23(a) matters if the evidence was obtained in good faith using "a warrant issued by a neutral magistrate based on probable cause." Like the State at trial, a defendant should have the burden of both preemptively addressing this exception and negating it.

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[62] *See* TEX. PENAL CODE § 2.02(b) ("The prosecuting attorney must negate the existence of an exception in the accusation charging commission of the offense and prove beyond a reasonable doubt that the defendant or defendant's conduct does not fall within the exception."). *See also* TEX. PENAL CODE § 1.07(22) ("'Element of offense' means: . . . (D) the negation of any exception to the offense.").

[63] *White*, 549 S.W.3d at 161-62 (Keller, P.J., concurring).

It's his show.

Finally, placing the burden on the defendant makes sense procedurally. This Court has characterized the pretrial suppression process as a mere variation on a trial objection[64] but it is much more. The hearing itself is a gift: the trial court has no obligation to hold a hearing or entertain evidence beyond the pleadings.[65] And the potential benefits to the defendant are great: he has the opportunity to pre-empt trial entirely by making the State's central evidence inadmissible or by reducing the case to an agreed judgment contingent upon the appellate resolution of a legal issue or issues. Moreover, the defendant gets to pick the "discrete issue or issues to be litigated early."[66] That puts him in control. If a defendant wants the benefits of pretrial resolution of his Article 38.23 issue, he should provide the trial court with everything it needs to resolve the issue. That means negating the exception to Article 38.23(a)'s application.

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[64] *Black v. State*, 362 S.W.3d 626, 633 (Tex. Crim. App. 2012) ("[A] pretrial motion to suppress evidence is nothing more than a specialized objection to the admissibility of that evidence.") (quotation and citation omitted); *see also State v. Esparza*, 413 S.W.3d 81, 93 (Tex. Crim. App. 2013) (Keller, P.J., concurring) ("A pretrial ruling on a motion to suppress . . . is simply a determination of whether the evidence should be excluded on a particular basis.").

[65] *Black*, 362 S.W.3d at 633 (quotation and citation omitted). *See* TEX. CODE CRIM. PROC. art. 28.01 § 1(6) ("Motions to suppress evidence–When a hearing on the motion to suppress evidence is granted, the court may determine the merits of said motion on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court[.]").

[66] *Esparza*, 413 S.W.3d at 93 (Keller, P.J., concurring).

III. Appellee has failed to satisfy his burden.

Appellee's entire case for suppression was the omission of a signature block from the warrant. Even if this is a violation of a statute Article 38.23(a) is meant to cover, there is no plausible argument for a causal connection between that omission and the blood collected. Regardless, appellee has not negated the exception to Article 38.23(a) by showing the absence of a warrant, probable cause, a neutral magistrate, or good faith.

A. Appellee failed to satisfy his threshold burden.[67]

The right kind of law?

As noted above, this Court has limited subsection (a)'s application to those statutes that serve "to deter unlawful actions which violate the rights of criminal suspects in the acquisition of evidence for prosecution."[68] However, while it is clear that "Article 38.23(a) may not be invoked for statutory violations unrelated to the purpose of the exclusionary rule or to the prevention of the illegal procurement of evidence of crime[,]"[69] this Court has not explained how much relation to that purpose is sufficient.

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[67] The State did not preserve or challenge on appeal appellee's satisfaction of his threshold burden, but consideration of all of appellee's burdens is helpful in this case because the nature of the alleged violation involves the warrant itself.

[68] *Wilson*, 311 S.W.3d at 459.

[69] *Id*.

In *Wilson*, for example, the Court held that Section 37.09, the penal offense against tampering with or fabricating evidence, "is exactly the type of law violation that the Texas Legislature intended to prohibit when it enacted article 38.23—conduct by overzealous police officers who, despite their laudable motives, break the penal laws directly related to gathering and using evidence in their investigations."[70] "A police officer's violation of section 37.09 (or section 37.10) to obtain a confession or other evidence is at the core of conduct proscribed by the Texas exclusionary statute[,]"[71] as Section 37.09 is "a state law directly related to the acquisition and use of evidence in criminal investigations and proceedings."[72]

Is the statutory requirement for a printed or typed signature block on a warrant comparable to breaking an evidentiary penal law? It certainly relates to warrants, but is typing a warrant without a signature block "at the core of conduct proscribed by the Texas exclusionary statute?" Would excluding evidence obtained by a warrant without a signature block "deter unlawful actions which violate the rights of criminal suspects in the acquisition of evidence for prosecution?" The Legislature apparently thought Article 18.04(5) would have some effect on police conduct, but its primary

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[70] *Id*. at 461. *See* TEX. PENAL CODE § 37.09.

[71] *Wilson*, 311 S.W.3d at 461.

[72] *Id*. at 464.

impetus appears to have been preventing police from committing outright theft, not from "violat[ing] the rights of criminal suspects in the acquisition of evidence for prosecution."[73] It does not appear focused on the primary purpose of Article 38.23(a).

Again, the Court need not answer this question but it is helpful in assessing the propriety of exclusion under Article 38.23 as a whole. The inapplicability of Article 38.23(a) to the violation of the signature-block statute becomes clearer when the rest of appellee's burden is considered.

No causal connection

Assuming the signature-block requirement is the sort of statute contemplated by Article 38.23(a), appellee had to prove that the violation of that requirement caused the State to obtain the blood in this case. Appellee has not done that. It is doubtful anyone could.

Appellee had to prove that the magistrate would not have signed the warrant but for the absence of the signature block. No magistrate would admit to that and no rational fact-finder would infer it. It was an oversight that could not alter the magistrate's calculus of probable cause, and everyone knows it. The impossibility

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[73] According to appellee, Article 18.04(5) was created in response to the abuses of a tiny number of law enforcement officers using false warrants to steal property from drug dealers. https://lrl.texas.gov/scanned/hroBillAnalyses/84-0/HB644.PDF; 1 CR 61-63. It is unclear why officers crooked enough to forge a signature to steal from people would not print a real or fictitious magistrate's name below.

of proving causality further underscores the conclusion that the signature-block requirement is not the sort of law the Legislature had in mind when it drafted Article 38.23(a).

B. Appellee failed to (successfully) challenge the exception.

Even if exclusion under Article 38.23(a) would otherwise be appropriate, appellee should have shown why its exception did not apply. That exception has four parts: 1) objective good faith reliance, 2) upon a warrant, 3) issued by a neutral magistrate, 4) based on probable cause. Appellee said probable cause was not at issue. He never contested the neutrality of the magistrate. And he treated the "good faith" issue as something the State must prove but could not without the officer's testimony. Instead, his entire argument was that the warrant was facially invalid for the lack of signature block. The only way that appellee satisfied his burden is if the warrant in this case is not a warrant.

A warrant is a "warrant" for purposes of Article 38.23(b) when it does what warrants do.

There are two types of warrants defined in the Code of Criminal Procedure: search and arrest.[74] The definition of "search warrant," as recognized by this Court,

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[74] TEX. CODE CRIM. PROC. art. 3.01 ("All words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specially defined.").

is found in Article 18.01.[75] Subsection (a) defines the term:

> A "search warrant" is a written order, issued by a magistrate and directed to a peace officer, commanding him to search for any property or thing and to seize the same and bring it before such magistrate or commanding him to search for and photograph a child and to deliver to the magistrate any of the film exposed pursuant to the order.[76]

By definition, then, a "warrant" is 1) a written order, 2) from a magistrate, 3) to a peace officer, 4) telling the officer, 5) to find and seize a person or thing. When Article 38.23(b) uses the word "warrant," this is what the Legislature is referring to.[77] The warrant in this case meets all of these requirements. Appellee has not argued otherwise.

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[75] *Mulder v. State*, 707 S.W.2d 908, 915 (Tex. Crim. App. 1986) (en banc) ("The court's order in the instant case meets the requirements of Art. 18.01 and is a search warrant as required by law."); *see also State v. Toone*, 872 S.W.2d 750, 752 (Tex. Crim. App. 1994) ("Article 18.01 of the Code of Criminal Procedure, Search Warrant, sets forth conditions under which a search warrant may be issued and executed.").

[76] TEX. CODE CRIM. PROC. art. 18.01(a).

[77] Among the many specific rules for various search situations, Article 18.01 also includes this basic substantive rule:

> No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.

TEX. CODE CRIM. PROC. art. 18.01(b). The definition of "search warrant" initially included the requirement of a sworn complaint and probable cause, but that provision was severed when the statute was amended in 1973. Act of 1965, 59th Leg, R.S., ch. 722, 1965 Tex. Gen. Laws 317, 382; Act of 1973, 63rd Leg, R.S., ch. 399, § 2(E), 1973 Tex. Gen. Laws 982. The fact that the definition of "search warrant" no longer includes the requirement of probable cause jibes with Article 38.23(b)'s requirement that the warrant relied upon be based on probable cause; if probable cause were intrinsic there would be no need for Article 38.23(b) to require it. It is also consistent with the Supreme Court's implicit recognition in *Leon* that a warrant is still a warrant even if probable cause never existed.

Instead, appellee argues that the warrant in this case was facially invalid because it failed to comply with one of the five "requisites" of Article 18.04. Article 18.04, which is entitled "Contents of Warrant," says:

> A search warrant issued under this chapter . . . shall be sufficient if it contains the following requisites:
>
> (1) that it run in the name of 'The State of Texas';
>
> (2) that it identify, as near as may be, that which is to be seized and name or describe, as near as may be, the person, place, or thing to be searched;
>
> (3) that it command any peace officer of the proper county to search forthwith the person, place, or thing named;
>
> (4) that it be dated and signed by the magistrate; and
>
> (5) that the magistrate's name appear in clearly legible handwriting or in typewritten form with the magistrate's signature."[78]

Note that it parallels Article 18.01(a)'s requirement that a warrant command a peace officer to search but adds three requirements not found in the definition. Note also that, unlike Article 18.01(b), it does not require probable cause or a sworn affidavit. It thus appears that the "requisites" that purport to make warrants "sufficient" are neither definitional nor sufficient to withstand a substantive challenge. It raises doubt as to how requisite they are.

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[78] TEX. CODE CRIM. PROC. art. 18.04.

Regardless, the omission of a "requisite" not found in the definition of "search warrant" does not make the warrant facially invalid for the purpose of Article 38.23. This Court has held as much with regard to arrest warrants. In *Dunn v. State*, this Court rejected the argument that fruits of an arrest must be suppressed because the arrest warrant, though based on probable cause, was not signed by the magistrate as required by statute.[79] "This appears to be exactly the type of situation intended to be covered by article 38.23(b)."[80] Despite the (important) technical defect of a missing signature, the warrant "had *issued* for purposes of the good faith exception of article 38.23(b)."[81] There is no reason to treat search warrants—or missing signature

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[79] 951 S.W.2d 478, 479 (Tex. Crim. App. 1997). Arrest warrants, like search warrants, have separate statutes for their definition and "requisites." "A 'warrant of arrest' is a written order from a magistrate, directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law." TEX. CODE CRIM. PROC. art. 15.01. The "[r]equisites of warrant[s of arrest]" in Article 15.02 are that "[i]t issues in the name of 'The State of Texas', and shall be sufficient, without regard to form, if it have these substantial requisites:

> (1) It must specify the name of the person whose arrest is ordered, if it be known, if unknown, then some reasonably definite description must be given of him.
> (2) It must state that the person is accused of some offense against the laws of the State, naming the offense.
> (3) It must be signed by the magistrate, and his office be named in the body of the warrant, or in connection with his signature."

Note that, unlike Article 18.04, Article 15.02 refers to the listed items as "*substantial* requisites" and contrasts them with matters of form. Article 18.04 does not and, as noted above, only one of the five things listed in Article 18.04 is a matter of substance according to the definition of "search warrant." Note also that while most of the "requisites" are similar—caption, identification of the item/person and magistrate signature—some are exclusive to arrests or warrants.

[80] *Dunn*, 951 S.W.2d at 479.

[81] *Id*. (emphasis in original).

blocks—differently.[82]

Recognizing the distinction between the existence of a warrant and the presence of flaws within it would also parallel this Court's treatment of charging instruments. As with warrants, there is a difference between what makes an indictment an indictment and its statutory "requisites."[83] As such, "an indictment . . . is still an indictment . . . , at least as contemplated by Art. V, § 12, though it be flawed by matters of substance such as the absence of an element."[84]

Appellee failed under any applicable theory of law.

Appellee's sole argument was that the warrant in this case was not a warrant. It is, by definition. Not only did he fail to carry his burden according to statute, but the warrant at issue far exceeds what the Supreme Court requires for good-faith reliance on a warrant. There is no basis upon which to uphold the trial court's ruling.

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[82] Courts of appeals have already extended Dunn's reasoning to search warrants. *See Wheeler v. State*, 573 S.W.3d 437, 445 n.8 (Tex. App.–Fort Worth, 2019, pet. filed PD-0388-19) (affidavit for blood warrant lacked an oath) (citing *White v. State*, 989 S.W.2d 108, 110 (Tex. App.–San Antonio 1999, no pet.); *Cole v. State*, 200 S.W.3d 762, 765-66 (Tex. App.–Texarkana 2006, no pet.) (magistrate's signature on search warrant appeared under printed language that suggested it was being signed only in his capacity to administer oaths).

[83] TEX. CONST. Art. V, § 12 (a written instrument properly presented that charges a person with the commission of an offense is an indictment for jurisdictional purposes even if it fails to include all "the contents . . . and requisites . . . as provided by law."); *compare* TEX. CODE CRIM. PROC. art. 21.01 (defining indictment) *with* art. 21.02 ("Requisites of an Indictment").

[84] *Studer v. State*, 799 S.W.2d 263, 271 (Tex. Crim. App. 1990).

Any other result would be absurd.

The defect in the warrant at issue is as technical as it gets. It did not even exist until 2015. If a statutory exception to exclusion of blood evidence can be invalidated by the omission of a signature block notwithstanding objective good faith, probable cause, a neutral magistrate, and a warrant, the result can only be "disrespect for the law and administration of justice."[85]

IV. The State was deprived of the opportunity to satisfy whatever burden it had, pretrial or on appeal.

To the extent the State had the burden to prove the exception to exclusion, it largely satisfied it as a matter of law. Any failing is attributable to the way in which the hearing was conducted and the findings made.

A. The elements of the exception are nearly all discernible on this record.

Article 38.23(b) requires that the evidence was obtained by 1) a law enforcement officer, 2) acting in objective good faith reliance, 3) upon a warrant, 4) issued by a neutral magistrate, 5) based on probable cause. Three of these elements require no additional evidence than that presented in Defense Exhibit 1. The trial court (implicitly) found that Officer Garcia was a law enforcement officer, and whether the warrant, admitted as Defense Exhibit 1, is a warrant supported by probable cause is a question of law based on the affidavit with deference shown to the

[85] *Leon*, 468 U.S. at 908 (citations, quotations, and alterations omitted).

magistrate who issued the warrant.[86] That leaves "good faith" and "a neutral magistrate."

B. Review of the remaining elements requires intervention.

"Good faith" is an objective inquiry that should be discernible without Garcia's testimony based on the warrant application. The magistrate should enjoy a presumption of neutrality buttressed by, again, the information contained in the warrant application.[87] Both were additionally supported by Officer Garcia's post-hearing affidavit and his offense report, which the State attached to the briefing requested by the trial court; the magistrate is identified in both documents.[88] But the trial court refused to consider either, failed to issue a requested finding on neutrality, and issued an alternative conclusion that Garcia was not shown to have acted in good faith. The State cannot show that it satisfied a burden under subsection (b) unless the trial court issues all the findings requested of it.[89] That cannot happen unless the trial court is required to consider all the evidence it made necessary.

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[86] *Id*. at 914.

[87] *See Flores v. State*, 367 S.W.3d 697, 703 (Tex. App.–Houston [14th Dist.] 2012, pet. ref'd) (presuming magistrate was neutral in the absence of contrary evidence).

[88] 1 CR 79 (post-hearing affidavit), 89 (offense report).

[89] *State v. Cullen*, 195 S.W.3d 696, 699 (Tex. Crim. App. 2006) (upon the request of the losing party, the trial court shall state its essential findings, i.e., "findings of fact and conclusions of law adequate to provide an appellate court with a basis upon which to review the trial court's application of the law to the facts.").

The trial court's discretion to choose the mode in which hearings will be held, set out in Article 28.01 § 1(6) and discussed in cases like *Ford v. State,*[90] appears intended to give trial courts the flexibility to choose the means by which an *entire* "hearing" will be entertained—on motion, on affidavit, or upon oral testimony. It presumably was not intended to enable trial courts to select one mode and then punish a party for failing to offer evidence in another. This is especially true when the movant's legal argument shifts mid-hearing and the State is faced with the need for additional evidence. Remember, appellee's ground for suppression was the facial invalidity of the warrant; he did not contest any of the other aspects of the good-faith exception (such as Garcia's absence) until after both parties rested. And it was shortly after the identify of the magistrate became an issue that the trial court shifted modes by terminating the live hearing on the suppression issue in favor of briefing. It is unfair to find the State failed to present oral testimony from a witness it did not know would be needed until just before the trial court decided it wanted a paper hearing.[91]

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[90] 305 S.W.3d 530 (Tex. Crim. App. 2009).

[91] *Cf. Esparza*, 413 S.W.3d at 90 (application of the *Calloway* rule upholding rulings on any theory of law is "manifestly unjust" if losing party "was never fairly called upon to adduce" predicate facts necessary to new theory)

The State deserves the opportunity to have its evidence fully considered. The State submitted Officer Garcia's post-hearing affidavit and offense report because it was unsure what the trial court had in mind when it asked for briefing "on the issue at hand."[92] It did its best to comply with the trial court's request. In return, the trial court should have considered all of the State's evidence and made all of the findings that were requested of it. Only then can the court of appeals be able to consider the remaining points of error on remand.

V. Conclusion

Appellee invoked the statutory exclusionary rule. The burden he accepted should have included negating the exception to the rule he invoked. He attempted to prove that by arguing the warrant in this case is not a warrant. It is. As that was his only ground for suppression, his motion should have been overruled, at least on appeal. Alternatively, the State was prevented from satisfying its burden by the trial court's refusal to consider evidence and issue requested findings.

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[92] 1 RR 25.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and either reverse the trial court's suppression of evidence or remand to the Court of Appeals with orders to remand for additional fact-findings as requested by the State.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 9,227 words.

/s/ John R. Messinger
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of July, 2019, a true and correct copy of the State's Brief on the Merits has been eFiled and electronically served on the following:

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The time for the trial court to report back to this Court on appellee's representation has not yet elapsed. Counsel, if any, will be served when the State is notified.

/s/ John R. Messinger
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